No. 11868

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C. WHITNEY, MARY F. DE BENEDETTI, CLARA OWENS TURNER, TRINIDAD MORA, DOROTHY MORA, DORA GRAJEDA, CONCHITA GRAJEDA, MARY TIBBITTS and GUSSIE BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation, BEARL SPROTT, individually and d/b/a BEARL SPROTT, DOE I, DOE II, DOE III,

Respondents.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

Jurisdiction.

Appellants have appealed from an order and judgment of the District Court of the United States for the Southern District of California, Central Division, dismissing appellants' third amended complaint without leave to amend. Appellants had attempted to invoke the jurisdiction of the District Court of the United States under Section 24(8) of the Judicial Code (28 U. S. C. Sec. 41(8)) and Section 16(b) of the Fair Labor Standards Act of 1938 (29 U. S. C., Sec. 216(b)). The jurisdiction of this Court on appeal arises under Section 128 of the Judicial Code, as amended (28 U. S. C., Sec. 225).

Question Presented.

Whether or not a feeding establishment located within a manufacturing plant and operated by an outside agency engaged in the business of carrying on in-plant feeding is within the provisions of the Fair Labor Standards Act of 1938 (29 U. S. C., Sections 201-219, inclusive) and is required to pay compensation at the rate of time and one-half for hours in excess of forty hours per week.

Statutes Involved.

Fair Labor Standards Act of 1938, Section 3(j) (29 U. S. C., Section 203(j)) provides:

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Fair Labor Standards Act of 1938, Section 7(a) (29 U. S. C., Section 207(a)) provides:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce.
>
> "(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Fair Labor Standards Act of 1938, Section 13(a) (29 U. S. C., Section 213(a)) provides:

"The provisions of 6 and 7 shall not apply with respect to * * * (2) An employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce."

Statement of the Case.

This is an appeal from the order and judgment of the District Court of the United States for the Southern District of California, Central Division, granting respondent's motion to dismiss plaintiffs' third amended complaint without leave to amend upon the ground that plaintiffs were not engaged in commerce or the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938 (29 U. S. C., Sec. 207 (a)); that plaintiffs were not engaged in any process or occupation necessary to the production of goods for interstate commerce within the meaning of Section 3(j) of the Fair Labor Standards Act of 1938 (29 U. S. C., Sec. 203(j)).

Plaintiffs, or some of them, were employed by Bearl Sprott Company, Inc., commencing January 1, 1946 [Record pp. 2-3]. For purposes of defendants' motion to dismiss, the facts well pleaded in plaintiffs' complaint [Record pp. 2-7] had to be taken as admitted and it follows that on this appeal such complaint must be considered as a true statement of facts herein.

For purposes of simplification, the defendant Bearl Sprott Company, Inc., which employed plaintiffs or some of them on and after January 1, 1946, will herein be referred to as defendant.

Statement of Points to Be Urged.

1. Plaintiffs were not engaged in any process or occupation necessary to the production of goods for interstate commerce but were engaged in an occupation catering to the personal needs of the steelworkers and not in any sense connected with the production of steel, steel products or any goods for interstate commerce.

2. Plaintiffs' employer was carrying on a retail or service establishment, the greater part of whose selling or servicing was in intrastate commerce.

ARGUMENT.

Summary of Argument.

Here involved is a situation where plaintiffs are engaged in catering to the personal needs of the employees of the Columbia Steel Company. No showing has been made by appellants that this activity is in any fashion a process or occupation necessary to the production of goods for interstate commerce. The purview of the Fair Labor Standards Act of 1938 has only been extended beyond activities directly connected with the production of goods or the maintenance of plants and equipment in a few exceptional cases. These, in industrial feeding situations, are cases of inaccessability where the plant would have to shut down without such service or where the employer is engaged himself in the production of the goods for interstate commerce and the activities of the strictly food purveying employees are intermingled with the activities of covered employees. There the employer is using all of his employees as instrumentalities to achieve the desired end —the production of goods for interstate commerce. Respondents further contend that appellants' activities are also exempt in that they are engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce.

POINT I.

Plaintiffs' Third Amended Complaint Fails to Establish That Plaintiff Employees Were Engaged in the Production of Goods for Commerce.

A. The Activities of Plaintiffs Are Merely a Comfort and Convenience at Best and Are Not Necessary to the Production of Goods for Commerce or Connected in Any Way Therewith.

Defendant is engaged in the restaurant and feeding business, and among other activities, carried on the one involved herein, that of operating an industrial feeding establishment and cafeteria in the plant of the Columbia Steel Company in the city of Torrance, California. The Columbia Steel Company is admittedly engaged in the manufacture and distribution of steel and steel products and as such is engaged in the production of goods for interstate commerce. Plaintiffs and each of them were employees of defendant rather than of Columbia Steel Company.

We are here faced with the problem of the interpretation of the phrase "engaged in the production of goods for commerce" as found in Section 7(a) of the Fair Labor Standards Act of 1938. There is no contention on the part of appellants that they or any of them are "engaged in commerce." By Section 3(j) of the Act (Fair Labor Standards Act of 1938 (29 U. S. C., Section 203(j)), "engaged in the production of goods" is defined, in so far as relevant here, as the situation where the employee is employed in any process or occupation necessary to the production of such goods.

By the familiar process of judicial inclusion and exclusion the limits of necessity have been rather well defined, but as was said in *A. B. Kirschbaum Co. v. Walling* (1942), 316 U. S. 517, 520, 86 L. Ed. 1638,

> "The search for a dependable touchstone by which to determine whether employees are engaged in commerce or in the production of goods for commerce is as rewarding as an attempt to square the circle."

Therefore, though cases involving activities other than industrial feeding may be suggestive, it is necessary to more closely examine the industrial feeding cases in point. The case of *McLeod v. Threlkeld* (1943), 319 U. S. 491, 87 L. Ed. 1538, is the latest expression of the United States Supreme Court on the subject of the applicability of the Act to employees of an industrial feeding contractor. There meals were furnished to employees of a railroad engaged in interstate commerce. A cook who worked in a cook car which was moved from place to place following a railroad construction gang, was held not to be engaged in interstate commerce. The activity of the employee was the important thing, the Court saying, page 497:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other."

The Court went on to note that the Legislative history of the Fair Labor Standards Act of 1938 showed that Congress had rejected the idea of having the Act apply to those engaged in commerce or in any industry affecting commerce, but decided to limit the application of the Act to employees in commerce or engaged in the production of goods for commerce.

A well reasoned case, in which the factual situation was precisely similar to the facts of the within action, is the case of *Kuhn v. Canteen Food Service, Inc.* (D. C. Ill. 1944), 4 W. H. Cases 913. There as here the feeding was done by an outside industrial feeding contractor, there as here no showing was made by plaintiffs of the inaccessibility of the plant to other sources of meals, and there as here it was not shown that the restaurants or cafeterias were a link in the chain of production or a means whereby the manufacturing plant accomplished the purpose of its existence. The Court in distinguishing the case of *Consolidated Timber Co. v. Womack* (C. C. A. 9, 1942), 132 F. (2d) 101, 2 W. H. Cases 211 (which was one of the inaccessible lumber camp cases) and in making its decision said, page 918,

> "That case is readily distinguishable from the present case inasmuch as the cafeteria or restaurant operated by defendant corporation (a) was a separate and independent establishment; (b) it was not a part of the facilities of the company which operated the plant and produced the goods; (c) it is not shown in the complaint that any restaurant was a link in the chain of production of goods; (d) it is not shown by any allegation of the complaint that the service rendered by these independent establishments of defendant corporation were a means whereby the plant

> manufacturer accomplished the purpose of its existence. The Court is convinced that in cases where the production of goods is in an isolated spot where board cannot be readily obtained by employees, that it would be necessary for the company to furnish board to its employees, and in such cases the furnishing of the board would be a necessary part of the production of the goods. But where an independent contractor furnishes and makes available a service to employees of a plant and it is not shown that this service is a part of the manufacturer's business, then the service in furnishing food and refreshments is for the convenience but not necessity of the employees of the manufacturer, and service is not bound by such a close tie as makes the service thus made available to the plant employees necessary to the production of the goods."

This, it is submitted is the precise situation here. No showing was made that the activities of plaintiffs were a link in the chain of the production of goods or that defendant's establishment was a means by which the Columbia Steel Company accomplished the manufacture and distribution of steel and steel products, nor was any showing of inaccessibility made.

In *Ferguson v. Prophet Co.* (D. C. Ind. 1946), 6 W. H. Cases 284, cited by the appellants, the Court determined that such showing had been made by reason of the much more intimate connection of defendant's employees with the manufacturing plant within whose gates they were employed and because of the inaccessibility of such plant.

The employees hired there had to pass through the screening of the plant personnel department and secure its

approval. Furthermore the feeding contractor therein could draw at all times on the plant for additional help, and in fact, it would seem that its labor force at all times consisted in part of plant employees. Plaintiff there further showed that only one restaurant was closer than one mile and it could only serve 100 people. There was another restaurant about a mile away (capacity not shown) and the next one was one and one-half miles away which could serve 50 or 60 people.

In the instant case, if the plaintiffs could have alleged inaccessibility they would, it must be presumed, have done so. The Court can take judicial notice of the fact that the Columbia Steel Company plant is located within a short distance of numerous large restaurants in a populous and growing city.

Basik v. General Motors Corporation (1945), 311 Mich. 705, 19 N. W. (2d) 142 (5 W. H. Cases 408), cited by appellants, is, with the exception of the lumber camp cases, the remaining case concerning industrial feeding discovered by counsel herein. It involved a situation in direct contrast to the instant case, a situation where the manufacturing plant itself carried on the feeding of its own employees. The Court reviewed the night watchman cases and the inaccessible lumber camp cases and said, significantly, with reference to the case of *Armour & Co. v. Wantock* (1944), 323 U. S. 126, 89 Ed. 118, at page 145 of 19 N. W. (2d),

> ". . . that, although not decisive, the fact that the employer shows no ostensible purpose for being in business except to produce goods for commerce, is entitled to consideration in determining whether employees hired by him are engaged in work which is 'necessary' to the production of goods for commerce."

B. Plaintiffs Are Ministering to the Personal Needs of the Steelworkers and Are Not Engaged in the Production of Steel and Steel Products.

It is submitted that cases involving firemen, watchmen, and maintenance-of-plant employees, whether such employees are employed directly by the manufacturer, or by the independent contractor, are not controlling here. Here the personal needs of the workers are ministered to; in those cases the plant or the machinery is kept in repair and enabled to turn out goods for commerce. To hold that plaintiffs are within the purview of the Fair Labor Standards Act of 1938 (29 U. S. C., Secs. 201-219) is as unwarranted an extension of the scope of the Act as it would be if in the case of an employee that brought his own lunch, an attempt was made to hold that a cook or housekeeper who prepared such lunch at the employee's home was "engaged in the production of goods for commerce."

Other cases that have dealt with the problem of catering to the personal needs of production employees are *Consolidated Timber Co. v. Womack* (C. C. A. 9, 1942), 132 F. (2d) 101, and *Hanson v. Lagerstrom* (C. C. A. 8, 1943), 133 F. (2d) 120, both cited by appellants. Both cases involved inaccessibility; in the former there was no other eating facility within 20 miles and in the latter there was only a small doughnut and coffee shop nearby which was wholly inadequate. In those cases, if meals had not been provided by the employer the operations would have entirely ceased. The case of *Kuhn v. Canteen Food Service, Inc., supra,* distinguished them on this ground. Note also that the food was provided by the employer who was in each case engaged in the produc-

tion of goods for interstate commerce. The case of *Relander v. Mason County Logging Co.* (Wash. Superior Ct., 1942), 2 W. H. Cases 1052, involved a lumber camp that was accessible. The Court there distinguished the *Womack* case, *supra,* held the employees not covered by the Act, and pointed out that the work had continued for five months while the cookhouse was shut down.

It would seem clear from the cases, then, that the rule is that a case of real necessity must be shown, a showing that without the food service production would be shut down or seriously curtailed. Merely that it might be pleasant and convenient to have a restaurant or cafeteria in a plant is not enough, an exception to the exemption of employees of an independent contractor catering to the personal needs of workmen will only be made in cases of extreme necessity, where but for such service the plant would have to shut down or seriously curtail operations. In the instant case no showing is made that the abandonment of service by defendant would have caused a ripple in the production of Columbia Steel Company. Presumably more workers would have brought their lunches and the rest would have eaten at nearby restaurants.

The cases of *Armour & Co. v. Wantock* (1944), 326 U. S. 126, 89 L. Ed. 118; *Walton v. Southern Package Corporation* (1944), 320 U. S. 540, 88 L. Ed. 298; and *A. B. Kirschbaum Co. v. Walling* (1942), 316 U. S. 517, 86 L. Ed. 1638, all cited by counsel for appellants as authorities for their contentions herein, involved auxiliary firemen, night watchmen, and building maintenance employees and elevator operators, respectively. In each case such employees carry on activities directly related to plant maintenance or protection and contribute directly to the

maintenance of the flow of goods into commerce. None of these cases apply to our situation, where a contribution to the personal desires and convenience of the employees is alleged to render appellants subject to the Fair Labor Standards Act of 1938 (29 U. S. C., Sections 201-219).

Two further cases are instructive. The first is that of *Harlan-Wallins Coal Corporation v. David* (1946), 303 Ky. 84, 196 S. W. (2d) 881, where the caretaker of a bathhouse maintained by the company for the use of such employees as cared to take advantage of it and pay one dollar a month, was held not to be engaged in the production of goods. The nature of the work performed by the employee was the deciding factor in the decision therein. Even though bathtaking is healthy and promotes morale, it is, like the food cases, too remote from the chain of production. Another analogous case is *Wilson v. R. F. C.* (C. C. A. 5, 1946), 158 F. (2d) 564, where the Reconstruction Finance Corporation built houses for workers in the magnesium plant of an independent contractor. It was held that firemen, and operators of the water plant that served these workers' homes, were not engaged in the production of goods for commerce.

It is submitted that the services in the above cases are similar to those of the instant action where the nutritional needs of plant workers are catered to. Such services are attentions to the personal needs of the workers and must be sharply distinguished from the situation where some service is rendered which contributes in some way to the manufacturing plant and its facilities, or to one or more of the elements that go to make up the finished goods which are sent out into the stream of commerce. It must be borne in mind that activity that caters to the *personal*

convenience of the worker and activity *necessary* to the production of goods are completely different and must not be confused. A few years ago everybody brought lunches; now many desire to eat in restaurants. This shift in custom does not create a necessity to the production of steel in catering to this desire. It is the satisfaction of a personal convenience and desire, not steelmaking.

II.

Plaintiffs Are Engaged in a Retail or Service Establishment, the Greater Part of Whose Selling or Servicing Is in Intrastate Commerce.

As was pointed out in *Consolidated Timber Co. v. Womack* (C. C. A. 9, 1942), 132 F. (2d) 101, an ordinary restaurant or eating place renders a service rather than makes a sale. As such service establishment, defendant catered to the personal needs of the workers and business visitors to the plant [Rec. pp. 3-4]. Serving of meals was not restricted to the employees. The food was sold for cash to the employees or business visitors of the Columbia Steel Company [Rec. 3-4], and defendant catered to the needs and wants of such employees and business visitors viewed as a part of the general consuming public and not merely as employees. As was so aptly stated by Mr. Justice Holmes in *Terminal Taxicab Co. v. Kutz* (1916), 241 U. S. 252, 60 L. Ed. 984:

> "The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. German Alliance Ins. Co. v. Kansas, 233 U. S. 389. The public does not mean everybody all the time."

Also it should be noted that where exemption is claimed under Section 13(a) of the Fair Labor Standards Act of 1938 (29 U. S. C., Sec. 213(a)), the test is the primary business of the *employer* not the particular activity of the employee. The emphasis of the language of the section is on the nature of the establishment of the employer, not the activity of the particular employee. The primary business of the industrial feeding contractor is to operate a restaurant which is a "service establishment" and which is, therefore, clearly exempt.

Conclusion.

It is respectfully submitted, therefore, that the order and judgment of the District Court of the United States for the Southern District of California, Central Division, is correct and should be affirmed. Appellants are not covered by the Fair Labor Standards Act of 1938, and therefore appellants' third amended complaint does not state a claim upon which relief could be granted by the Court below.

Respectfully submitted,

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